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No. 10-45

In the
Supreme Court of the United States

ROBERT A. STONEROCK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN J. SCACCIA, JR.
Counsel of Record
SCACCIA & ASSOCIATES
536 WEST CENTRAL AVE.
2ND FLOOR
SPRINGBORO, OH 45066
(937) 223-7848
j5cac44@msn.com

Counsel for Petitioner
Robert A. Stonerock

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

I. (a) Whether the Framers of the Constitution intended the instrument to embody principles of limitation of authority delegated from the people as distinct from principles of separation of power?

(b) Whether the three constitutional provisions that specify that "Congress shall have the power to...punish..." reflect the Framer's intent to limit the authority of Congress to prescribe punishment or declare the sentence to be imposed in criminal cases to "counterfeiting the Securities and current Coin of the United States" (Art. I § 8 Cl. 6); "Piracies and Felonies committed on the high seas and Offenses against the Law of Nations" (Art. I § 8 Cl. 10) and "Treason" (Art. III § 3 Cl. 2)? *Expressio unius est exclusio alterius. Federalist Papers* Nos. 78, 81.

(c) Whether this Court's statement that "Congress...has the power to fix sentence for a federal crime and the scope of judicial discretion with respect to a sentence is subject to congressional control," *Mistretta v. United States*, 488 U.S. 361, 364 (1989), should be examined in light of specific provisions of the Constitution that were not at issue in *Mistretta* and reconsidered to examine whether Congress was granted authority to prescribe the specific punishment (or mandatory minimum sentence) outside the parameters of Article I § 8 Cl. 6, Article I § 8 Cl. 10 and Article III § 3 Cl. 2?

(d) Whether the holding and application of *Mistretta v. United States, supra,* should be examined and limited?

II. (a) Whether a plea agreement is a contract that should be interpreted in light of all the traditional rules and remedies for contract interpretation and application?

(b) Whether *United States v Booker*, 543 U.S. 220 (2005), precludes considering to a Defendant's detriment matters that are not admitted to or found to have occurred by a jury?

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INTRODUCTORY PRAYER

The petitioner respectfully requests that this Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit entered on January 26, 2010.

OPINIONS BELOW

The decision and entry issued by the United States Court of Appeals for the Sixth Circuit entered on January 26, 2010 (Apx. 1a-22a). The judgment of the United States District Court for the Southern District Ohio (Apx. 23a-32a). The decision and entry of the United States Court of Appeals for the Sixth Circuit denying rehearing en banc (Apx. 33a-34a)

JURISDICTION

The Court of Appeals entered its judgment on January 26, 2010. Apx.1a. A timely petition for rehearing *en banc* was filed on February 9, 2010. On April 2, 2010 an Order denying rehearing *en banc* was entered. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Pertinent provisions of the Constitution of the United States of America provide:

Article I Section 8 Clause 6: Powers of Congress.

> The Congress shall have Power...To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

Article I Section 8 Clause 10: Powers of Congress.

> The Congress shall have Power...To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

Article III Section 3 Clause 2: Treason.

> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

STATEMENT OF THE CASE

This case examines whether the Constitution's grant to the Legislative Department of authority to "punish" in only three categories of criminal cases means that Congress has not been granted the authority to establish mandatory minimum sentences in criminal cases that do not fall within those categories enumerated in Art. I § 8 Cl. 6, Art. I § 8 Cl. 10 and Art. III § 3 Cl. 2. Though this issue has never been examined prior to the instant case, the Sixth Circuit declined (Apx. 6a-9a) to interpret these provisions relying upon *Mistretta v. United States*, 488 U.S. 361 (1989), to reject Petitioner's argument.

Separately, issue is also presented with the applicability of contract principles to plea bargains and whether a contract can be rescinded only on constitutional grounds or a showing of bad faith. There is also concern about whether, absent a contractual agreement, application of mandatory sentencing guidelines can consider alleged wrongdoing neither admitted nor found by a jury without doing violence to the holding in *United States v. Booker*, 543 U.S. 220 (2005).

Implicated in both issues is whether fundamental Constitutional principles envisioned by the Framers is being sacrificed to attained what has thus far been the unachievable twin goals of decreasing variation in sentencing upon similarly situated offenders and uncertainty of the time the offender is to serve.[1] *Mistretta v. United States*, *supra*, at 366.

The factual and procedural background is as follows: On January 22, 2002, a grand jury returned a two-count indictment against Petitioner, Robert Anthony Stonerock. The first count originated in Arizona, and charged Mr. Stonerock with one count of knowingly and intentionally conspiring to possess with the intent to distribute over 1000 kilograms of marijuana, contrary to 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(vii) and 846 (attempt and conspiracy). There was no gun specification on this count. The second count was for possession of a firearm by a prohibited

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[1] The failure of the goals is also factually epitomized by the fact that the leader of the criminal enterprise, Mr. Mendoza, received a substantially lesser sentence than Mr. Stonerock (See R. 137 (Sealed), Sentencing Memorandum, JA p. 513).

person, in violation of 18 U.S.C. § 922(g)(1) and (2). Because Mr. Stonerock had a prior marijuana trafficking conviction, he was prohibited from possessing a firearm. The second count arose from the execution of a search warrant of Mr. Stonerock's family residence in Dayton, Ohio. Additionally, $160,000 was found in a washing machine. Mr. Stonerock never admitted to possession of the weapons, was never convicted of weapons possession and denied the charge. The weapons charge was dismissed in January 2003 when Mr. Stonerock entered a guilty plea to Count One of the indictment, pursuant to a written plea agreement. Apx. 2a-3a.

With the change of plea, Mr. Stonerock's previously filed Motion to Suppress was vacated. A written plea agreement or contract was drafted by the U.S. Attorney and made specific promises and representations that the "Government will" take specific actions with respect to sentencing including a recommendation of a "32 base level" and that Mr. Stonerock be given "a three-point adjustment for acceptance of responsibility pursuant to U.S. Sentencing Guidelines section 3E1.1" (R. 91, TR. 1/23/03 Plea Hearing at 27-31, JA p. 67-71) (*See* Apx. 22a, Merritt, J., concurring; fn. 5 *infra*). Additionally, the agreement provided:

> 4. If, in the opinion of the U.S. Attorney for the Southern District of Ohio, the Defendant renders substantial assistance within the meaning of U.S. Sentencing Guideline 5K1.1 and 18 U.S. Code section 3553(e), the United States will file a motion pursuant to these provisions. The Defendant acknowledges and under the law and the terms of this plea

> agreement the United States retains sole and complete discretion in determining whether a departure motion based on substantial assistance will be filed...

(R. 91, TR. 1/23/03 Plea Hearing at 27-31, JA p. 67-71) (emphasis added). Under the contract it appears the government's sole remedy for breach provided; "if the Defendant refused to testify or otherwise provide complete, truthful cooperation, the Government may seek to set aside the Defendant's plea and reinstate the indictment."

Finally, as an inducement to enter the plea, the District Judge told Mr. Stonerock that the U.S. Attorney was duty bound to file a U.S.S.G. § 5K1.1 letter permitting the full judicial discretion in sentencing if Mr. Stonerock, in fact, provided substantial assistance (*Id.* at 12-13, JA p. 52-53).

> THE COURT: Now, if you provide that substantial cooperation, that substantial assistance to the government, the government will do what it says by asking me to give you a break in sentencing. But you must understand that I am not required to do or go along with what the government asks me to do. Do you understand that?

(*Id.*) (emphasis added).

Subsequently, a dispute later arose regarding sentencing. "The Pre-sentence Report (PSR) ... scored [Mr.] Stonerock's offense level at 34, which included a 2-point enhancement for a firearm under U.S.S.G. § 2D1.1(B)(1)." (Apx. 3a). Separately, the U.S.

Attorney, agreed that Mr. Stonerock "provided information, but asserted it was not substantial." (Apx. 4a). The Government stated it would not file a [U.S.S.G.] § 5K1.1 departure because Stonerock had "minimized some of the information that he provided," had not spoken about several issues ['regarding his finances and local (Dayton Ohio) co-conspirators'] and because of [a] pending Arizona matter" (Apx. 4a).

Mr. Stonerock disputed the Government's claims regarding the offense level and asserted the 2 point enhancement for firearms violated the contract and was unconstitutional under *United States v. Booker*, 543 U.S. 220 (2005), since he neither admitted nor was found guilty on the weapons claims. The issues regarding disclosure of information arose following a headline newspaper article that contained confidential information and resulted in death threats directed at Mr. Stonerock's family and a visit by criminal operatives. The Arizona matter concerned a post plea indictment in Arizona on drug charges however Mr. Stonerock insisted he was innocent and fought the charges, never admitted to the charges and by the time of sentencing Mr. Stonerock was dismissed from that case without any compromise by Mr. Stonerock. With respect to the instant case Mr. Stonerock argued consideration of the second Arizona charges was impermissible under *United States v. Booker* and its progeny. Mr. Stonerock's motion to vacate his plea was overruled by the District Court and upheld by the Sixth Circuit. Apx. 15a-20a.

Finally, though the Sixth Circuit did agree that the 2 point weapon's enhancement might violate the plea contract and remanded for further proceedings (Apx. 19a-20a) the Appellate Court rejected the claim that

the enhancement without admission or jury trial violated *Booker* (Apx. 16a-17a, 19a). The Appellate Court also rejected the concept that rescinding the contract could be considered as an appropriate remedy for breach. Apx. 17a-18a.

REASONS FOR GRANTING THE WRIT

I. The Constitution of the United States of America has Granted the Legislative Department the Power to Determine or Prescribe the Punishment, Including Mandatory Minimum Sentences, in only those Classes of Cases Identified in Art. I § 8 Cl. 6, Art. I § 8 Cl. 10 and Art. III § 3 Cl. 2

There are only three provisions in the Constitution were the Framers specifically granted Congress the "power to punish". Under Article 1 Section 8 (titled "Powers of Congress") the Constitution allows Congress the power to enact legislation including, "To provide for the Punishment of counterfeiting the Securities and current Coin of the United States" (Art. I § 8 Cl. 6). Congress was also permitted the "power"... "To define and punish Piracy and Felonies committed on the high Seas, and Offences against the Law of Nations" (Art. I § 8 Cl. 10). Finally, under Article 3, which otherwise "extends" "judicial Power ... to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties ..." (Art. III § 2 Cl. 1) subject to specific exceptions including that "The Congress shall have Power to declare the Punishment of Treason ...", Art. III § 3 Cl. 2.

No case defines the phrase "power to punish" as use in these Constitutional provisions. However, the phrase 'power to punish" can only have one of two possible meanings: Either the power to adjudicate or the authority to control or proscribe (in one form or another) the punishment to be imposed for violation of the enacted laws. Since adjudication (subject to the specific exception of impeachment) is delegated solely to the Judicial Department, the only viable meaning for the phrase "power to punish" is the authority to mandate the punishment, including mandating mandatory minimum sentences for these classes of crimes.

The words in our Constitution are never meaningless or trivial. There must be a reason why the Constitution made special note of Congress' authority to prescribe punishment for "counterfeiting", "piracy and felonies on the high seas" and "treason", but is otherwise silent on the power to punish in other classes of criminal cases. These three categories were certainly known crimes at common law, and were considered some of the most serious.

It is submitted that Congress has no power or authority granted to it under the Constitution to establish or dictate the specific punishment in criminal cases except in the context of violations of statutes promulgated under Art. I § 8 Cl. 6, Art. I § 8 Cl. 10, or Art. III § 3 Cl. 2. Except in these three categories of cases, the framers envisioned a judge's ability (subject to judicial review) to fashion an offender's sentence as so integral and essential to our new tripartite system that Congress should be granted only a limited power to prescribe a definite punishment. Thus, Congress'

power was permitted for only the three enumerated categories and not granted in all other categories.

Both cannons of interpretation and historical text support this interpretation.

Expressio unius est exclusio alterius is a maxim for interpretation of laws which provides that the expression of one thing is the exclusion of another. "When certain persons or things are specified in law...an intention to exclude all others from its operation may be inferred." *Black's Law Dictionary* at 521 (1979). Under this maxim, if a law specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded. *Id.*

Expressio unius is a principle well know to the Framers and has also been applied by the Court in a manner consistent with the Constitutional interpretation suggested in this petition.[2]

Though the *Federalist Papers* do not specifically discuss the specific provisions at issue, the proposition that Congress was not granted authority to set punishment outside the three categories is consistent with the representations to the electorate who were persuaded to ratify the Constitution.

As a starting point the Framers of the Constitution represented to the Electorate that there are exceptions to Congress' power to legislate.

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[2] *E.g., United States v. Vonn*, 535 U.S. 55, 65 (2002); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002)

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution...which contains certain specified exceptions to the legislative authority.... Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

The *Federalist Papers* 595 (Sweetwater Press 2006), *Federalist Papers* No. 78, ¶11 (emphasis added).

The mechanism for Congressional influence over the Judicial Department was not to interfere in judicial decisions but, rather to ratify the appointment of wise and learned judges. A primary mechanism for Executive influence is to recommend such persons in the first instance.

> The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and as, on this account, there will be great reason to apprehend all the ill consequences of defective information, so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshalled on opposite sides will be too apt to stifle the voice both of law and of equity.... [T]he judicial power, in the last resort, [is] not to a part of the

> legislature, but to distinct and independent bodies of men.

Id. at 617-18, No. 81 ¶¶ 6-7. At its worst the Judiciary was to be a breeding ground for wise leaders and, at its best, a means to encourage the Executive to appoint, and Congress to confirm the appointment of, wise and learned judges.

Except for special panels of judges, such as the appellate courts, the judiciary was never intended, or envisioned, to be run by committee. A matter as important as sentencing, which could be used as a tool of oppression of the general liberty, was simply not to be decided by consensus or formula or even by democratic vote or Congress.[3]

> [T]hough individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. ...[T]here is no liberty, if the power of judging be not separated from the legislative and executive power....liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments....from the natural feebleness of the judiciary, it is in continual jeopardy of being

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[3] Petitioner is not suggesting that some sort of sentencing structure could not be fashioned under the rule making authority of the Court.

> overpowered, awed, or influenced by its co-ordinate branches ....

Id. at 594-95, ¶¶ 8-9 (emphasis added). The Framers intended the individual judge, subject to judicial review, to fashion relief that is best suited for the issues of the individual case and, in appropriate circumstances, refuse to apply law in a manner that achieves an unjust result.

> [T]he courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments... This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which... have a tendency ... to occasion dangerous innovations in the government, and serious oppressions...
>
> But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them.... Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure

> that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.
>
> That inflexible and uniform adherence to the rights of the Constitution, and of individuals ... we perceive to be indispensable in the courts of justice ... If the power of making them was committed to either the Executive or legislature, there would be a danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

Id. at 598-600, *Federalist Papers* No. 78, ¶¶ 18-21 (emphasis added). *Federalist Papers* No. 78 goes on to state, at ¶ 12, that "every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void...". Though sharing of some power between the executive and legislative branches was envisioned as a practical matter, the framers never intended that judicial power be shared with the other branches.

When examined in light of the issues presented in this case the Sixth Circuit's reliance on the *Mistretta* case is misplaced for two reasons. First, the issues in

the *Mistretta* case did not examine the Constitutional provisions at issue herein. This Court has long held that the issues presented limit the precedent of the case and the holding arising therefrom. When new issues are presented the result can change. *E.g., United States v. Booker, supra.*

Second, assuming, *arguendo*, the *Mistretta* case applies to the Constitutional arguments raised herein; the foundation of *Mistretta's* historical analysis of "congress' authority to fix the sentence for a federal crime" is premises on *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820). The *Wiltberger* case involved statutory interpretation not the Constitutional authority. That being said the portion of the statute at issue in *Wiltberger* provided "that if any seaman, or other person, shall commit manslaughter on the high seas, or confederate ... such person or persons so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars". *Id.* at 93-94. In obvious reference to Art. I § 8 Cl. 10, the Court referenced the prosecution's argument that "Congress is invested with authority to define and punish piracies and other felonies committed on the high seas." *Id.* at 77. However, Art. I § 8 Cl. 10 was not discussed and the sentencing provisions of the statute neither proscribed the minimum sentence nor limited judicial authority over the sentence imposed. *Id.* at 93-94, 106 (notes). In fact, the *Wiltberger* case never addressed sentencing issues but held that a felony committed on a ship sailing on a fresh water river in China is beyond the reach of the federal statute.

The other cases relied on in *Mistretta's* historical analysis also do not address the Constitutional

provisions at issue. However, the result sought by petitioner is not a radical departure from the historical practice. A close read of the cases cited in *Mistretta* reveal that until 1916 the practice which recognized the authority of judges to suspend legislatively declared mandatory sentences was widespread and considered an inherent power by many courts. *Ex parte United States*, 242 U.S. 27, 47-48, 50 (1916). Further, the *Mistretta* decision observed, as a practical matter, until the 1970's "Congress early abandoned fixed sentence rigidity" and "under the indeterminate sentence system, Congress defined the maximum, the judge imposed a sentence within the statutory range (which he usually could replace with probation)". *Mistretta*, supra at 364, 365.

Today judges in many cases have bemoaned the state of affairs arising from excessive congressional encroachments that eviscerates judicial sentencing power and reduces sentencing to a formula that disregards individual circumstances unless the prosecutor grants a 5k1.1 permission slip.[4] However,

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[4] *E.g.*, *United States v. Detwiler*, 338 F. Supp. 2d 1166 1176-78 (D. Or. 2004) (criticizing the opportunity for prosecutor; abuse and tyranny); *see, e.g.*, *United States v. Flores*, 336 F.3d 760,766 (8th Cir. 2003) (Bright, J., concurring) (presently, "much of the discretion in sentencing decisions unfortunately falls to persons far less qualified to judge an offender than the district judge. While we say the district judge sentences the offender, in fact, the prosecutor ... often has more input into the sentence to be imposed than does the district judge"); *United States v. Roberts*, 726 F. Supp. 1359, 1363 (D.D.C. 1989) (the "de facto transfer of much of the responsibility for sentencing from impartial judges to prosecutors has ... disturb[ed] the due process balance essential to the fairness of criminal litigation"), *rev'd sub nom. United States v. Doe*, 934 F.2d 353 (D.C. Cir.1991); *United States v. Bethancurt*,

as graphically demonstrated in Judge Merritt's concurring opinion[5], the federal courts are now reduced to pleading for the Executive branch for wisdom and mercy in sentencing to ignore political considerations and behave like judges of old.

Judge Merritt's concurring decision acknowledges under the current state of affairs, with its broad reading of the *Mistretta* case, the Judicial Branch is without its traditional power to fashion justice. This is a testimonial of the need to limit the application of the *Mistretta* case. Judge Merritt's plea to the Executive

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692 F. Supp. 1427, 1435 (D.D.C.1988) ("This shift is aggravated by the fact that prosecutors are far more subject to political, career, and other pressures than are lifetime judges"); *United States v. Kikumura*, 918 F.2d 1084, 1119 (3d Cir.1990) (Rosenn, J., concurring) (the Guidelines have "replaced judicial discretion over sentencing with prosecutorial discretion").

[5] "MERRITT, Circuit Judge, concurring. I concur in Judge White's opinion, but I would hope on remand that the government will reassess its decision--not subject to judicial review--to invoke the 10-year mandatory minimum in this non-violent marijuana case. The punishment seems unduly harsh. If given the benefit of Offense Level 32 minus 3 Levels, as promised in the plea agreement, the sentence would be more reasonable. Apparently, this cannot be done without a § 5K1.1 motion. The Department of Justice should give some consideration to the possibility of rehabilitation in this case, as well as to the enormous expense to the taxpayer imposed by mandatory minimum sentences in non-violent marijuana cases, a drug that some states have now legalized. The present law effectively makes the prosecutor the sentencer in these cases, and so the prosecutor should not view the case simply as an adversary but take the broader view using the great power of the Department of Justice to see that justice is done. It should take the opportunity to use the tools at hand--here, a 5K1.1 motion—to see that unreviewable, excessive, un-individualized mandatory minimum sentences are not imposed."

Branch is arises from too broad a reading of the *Mistretta* case and without consideration of the Constitutional provisions and arguments presented for the first time in this case. It is submitted that the practical result emphasized in Judge Merritt's concurring opinion is, though real, none the less alien to the letter and tenor or spirit of the Constitution as a whole. In other words, the Executive Branch should not solely determine when mercy in the court room is permitted. All that is necessary is to return to the Judicial Branch its traditional powers.

For almost 200 years, sentencing structure was based on principles in the tradition of Solomon; that sentencing should be decided based on wisdom (and dare we consider mercy) applied in individual cases. This concept has been displaced without anyone examining the limitations suggested by language in Article I Section 8 Clause 6 and Clause 10 or and Article III Section 3 Clause 2.

The framers took great care in the use of language. Similar care should be used in its interpretation less this republican form of government which seeks to be, and is, unique among nations slowly slides into a structure that retains the form but in substance resembles little the separation and limitation of powers envisioned by the framers. Whether this current situation arose from a political distrust of judicial discretion or a perception that subjective analysis results in unfairness is not the issue. What is at issue is the type of justice that is to be administered by the judge involved; whether the form of justice is to be directed by a preordained script and whether language in the Constitution should be ignored or reduced to triviality without close examination.

II. Plea Agreements are Subject to the Full Plethora of Principles Recognized for Interpreting and Applying Contracts, Including Specific Performance and Rescission of the Contract but Subject to Application of Constitutional Provisions for the Protection of Defendants

Plea agreements are contractual in nature and interpreted using traditional principles of contract law. They should be subject to traditional remedies. Though a criminal defendant also has the benefit of constitutional protections the defendant's remedies should not arise only if he shows violations of a constitutional magnitude or Government bad faith, as is the practice in the Sixth Circuit.

Using contract principles, Mr. Stonerock urges that the government must live by its plea agreement unless it shows he materially breached that agreement. See *United States v. Davis*, 393 F.3d 540, 547 (2d Cir. 2004). A material breach is one that deprives the non-breaching party of the benefit of its bargain. *Id.* As a corollary, "if a party's nonperformance...is innocent, does not thwart the purpose of the bargain, and is wholly dwarfed by that party's performance, the breaching party has substantially performed under the contract, and the non-breaching party is not entitled to rescission." *Id.* (citations and quotation marks omitted). Simply put, unless Mr. Stonerock has materially breached the Plea Agreement, the Government is obligated to render performance as promised.

As articulated by the trial court, the U.S. Attorney (*i.e.*, the Executive Branch) was duty bound under the

agreement to file a 5K1.1 letter if Mr. Stonerock, in fact, provided substantial assistance. The standard governing the government's decision was never articulated. If there was no meeting of the minds then the contract should have been rescinded as sought by Petitioner.

Rescission of a contract is appropriate if a failure of consideration defeats the very object of the contract or concerns a matter of such grave importance that the contract would not have been executed had that default been contemplated. This is the standard in the Sixth Circuit in non-criminal cases. *See In re Union Sec. Mortg. Co.*, 25 F.3d 338, 341 (6th Cir. 1994). There is no sound principle for affording less rights in criminal cases.

In the instant case, various failures caused the sentencing range to be improperly calculated and contrary to letter and spirit of the Plea Agreement as represented during the course of the plea hearing. Under the agreement Mr. Stonerock's offense level was to be a base level 32 with at least a three-point downward adjustment for acceptance of responsibility. Other factors should also have been considered to downgrade the sentencing level, instead Mr. Stonerock was sentenced at a level 31 because of improper inclusion of a weapons consideration.

Aside from the absence of the firearms issue in the plea agreement, as a Constitutional matter the Government violated Mr. Stonerock's rights by including firearm possession for sentencing purposes. The district court had been expressly dismissed that charge and the matter was not addressed in the negotiated statement of facts. Possession was not

otherwise admitted to and there was no jury verdict on this consideration. The demerit for a weapons issue was neither admitted nor specified to in the guilty plea nor found by a jury and, therefore, as a Constitutional matter should have been discounted as a sentencing consideration, especially since the weapons charges were dismissed. *United States v. Booker*, 543 U.S. 220 (2005); *see also, Blakely v. Washington*, 542 U.S. 296 (2004). Other Circuits would not have considered the weapons issue as such considerations run contra to the *Booker* case. *See, e.g., United States v. Marrero*, 325 F. Supp. 2d 453 (S.D.N.Y. 2004) (where defendant plead guilty to felon in possession of handgun, sentencing guidelines cannot be used to enhance sentence for obliteration of revolver serial number where obliteration was not admitted to or pled to or found by a jury to have occurred) (finding *Mistretta* implicitly overruled by *Booker*). Thus there appears to be a division among the Circuits that ought to be addressed.

CONCLUSION

For all the reasons set forth above, Petitioner, Robert Anthony Stonerock, respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

John J. Scaccia, Jr.
Counsel of Record
Scaccia & Associates
536 West Central Ave.
2nd Floor
Springboro, OH 45066
(937) 223-7848
j5cac44@msn.com

Counsel for Petitioner
Robert A. Stonerock

APPENDIX

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APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 10a0047n.06

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-3739

[Filed January 26, 2010]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
ROBERT ANTHONY STONEROCK,	)
	)
Defendant-Appellant.	)
	)

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

BEFORE: MERRITT, COOK and WHITE, Circuit Judges.

WHITE, Circuit Judge. Defendant Robert Stonerock pled guilty of conspiring to possess with the

intent to distribute and to distribute over 1000 kilograms of marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(vii) and 846. In exchange for Stonerock's guilty plea, the Government agreed to drop a firearm count that was part of the same indictment. The district court sentenced Stonerock to 121 months' imprisonment, followed by five years of supervised release. Stonerock appeals, raising constitutional challenges and arguing that the plea agreement should be specifically enforced. We affirm in part, and remand in part for a determination whether the two-point enhancement under U.S.S.G. § 2D1 is contrary to the plea agreement.

I.

From approximately January 1997 through November 2, 2001, Stonerock conspired with various individuals to distribute marijuana in the Dayton, Ohio area. Stonerock and his co-conspirators obtained marijuana from suppliers in Arizona and distributed it in the Dayton area, in exchange for money. Over 1,000 kilograms of marijuana were attributable to Stonerock personally.

On November 2, 2001, the Government executed search warrants at Stonerock's residence and seized approximately $160,000 in cash from the washing machine and bedroom, and two semiautomatic handguns, found under the sofa in the family room and in the master-bedroom closet. Stonerock was arrested later that day.

Approximately one month after Stonerock's arrest, Stonerock's counsel (at the time, Jon Paul Rion and John H. Rion) informed the Government that

Stonerock had information regarding his case to pass along. Stonerock met with Drug Enforcement Special Agent Joseph Hathaway a number of times and provided information.

A grand jury returned a two-count indictment against Stonerock and his co-defendant Stephen Mobley, Jr., on January 22, 2002. The indictment originated in Arizona, and charged Stonerock with one count of knowingly and intentionally conspiring to possess with the intent to distribute and to distribute over 1000 kilograms of marijuana, contrary to 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(vii) and 846 (attempt and conspiracy), and one count of possession of a firearm by a prohibited person, in violation of 18 U.S.C. § 922(g)(1) and (2). Because Stonerock had a prior marijuana trafficking conviction, he was prohibited from owning a firearm.

In October 2002, Stonerock changed counsel–from Rion and Rion to Matthew Arntz and George Katchmer. In January 2003, pursuant to a written plea agreement, Stonerock entered a plea of guilty to count one of the indictment, in exchange for which the Government dismissed the firearm count.

In February 2003, after Stonerock pled guilty, he was indicted in a drug and racketeering case in Arizona. The original case (the instant case) involved a marijuana distribution organization focused primarily in the Tucson area, while the later case focused on the Phoenix area.

The Presentence Report (PSR) in the instant case calculated the Guidelines range at 135 to 168 months' imprisonment, and recommended a 140-month

sentence. The PSR scored Stonerock's offense level at 34, which included a 2-point enhancement for a firearm under U.S.S.G. § 2D1.1(b)(1). In May 2003, Stonerock objected to the PSR, filed a motion for departure and requested a hearing, arguing that the firearm enhancement was improper and that the PSR's criminal history calculation was overstated his criminal history. Several months later, Stonerock filed a sentencing memorandum reasserting these claims, and adding that he had provided the Government substantial assistance (such that he should receive a reduction under U.S.S.G. § 5K1.1).

During a telephone conference set by the court, the Government agreed that Stonerock provided information, but asserted that it was not substantial. The Government stated it would not file a § 5K1.1 departure because Stonerock had "minimized some of the information that he's provided," had not spoken about several issues that were brought up in the plea agreement, and because of the pending Arizona matter. After the telephone conference, at the court's request, Agent Hathaway met with Stonerock to provide Stonerock another opportunity to qualify for a § 5K1.1 reduction. Agent Hathaway later testified that Stonerock failed to cooperate completely by refusing to answer questions regarding his finances and regarding local (Dayton, Ohio) co-conspirators.

In February 2004, Stonerock filed a second motion for downward departure, again raising the substantial assistance issue and requesting a sentencing hearing. Over the Government's objection on the ground that Stonerock failed to allege an unconstitutional motive, a hearing was held at which Agent Hathaway testified

regarding Stonerock's assistance and the firearm enhancement.

In July 2004, Stonerock's previous attorneys, Rion and Rion, substituted as Stonerock's counsel, replacing Matthew Arntz and George Katchmer. On January 26, 2005, two years after entering a guilty plea, Stonerock moved to vacate his plea.

In April 2006, Stonerock filed an updated sentencing memorandum, requesting an evidentiary hearing to elicit testimony regarding his cooperation, and to compel the government to file a § 5K1.1 motion. The Government opposed a hearing on the basis that Stonerock had failed to allege an unconstitutional motive. The district court held an evidentiary hearing in June 2006, following which the court asked the Government to present testimony regarding the status of the Arizona case. DEA Special Agent John Murphy, the Arizona case agent, testified in November 2006.

Later in November 2006, another evidentiary hearing was held at which Stonerock and his previous counsel, George Katchmer, testified. Katchmer testified that during the time he represented Stonerock, he (Katchmer) did not promise Stonerock he would qualify for the mandatory-minimum safety valve under U.S.S.G. § 5C1.2. Stonerock conceded that his attorneys made him no promises regarding the safety valve, but testified that his understanding was that he was eligible for it. At a later hearing, Katchmer's co-counsel, Arntz, testified he made no promises to Stonerock regarding the safety valve.

At the May 15, 2007 sentencing hearing, the district court stated it would overrule Stonerock's

motion to vacate his plea and issue its decision to that effect later that day. The court sustained Stonerock's challenge that his criminal history was overstated and reduced his criminal history category from III to II. The court ruled that Stonerock was ineligible for a safety valve reduction under U.S.S.G. § 5C1.2 because of his criminal history category (greater than I), and firearm enhancement. The court further concluded that the government's decision not to seek a § 5K1.1 departure (for substantial assistance) was more than amply supported, and that the Government's decision was not based on an unconstitutional motive or bad faith.

Based on Stonerock's offense level of 31 (34 minus 2 for acceptance of responsibility, and minus 1 for timely notification of intent to plead guilty) and criminal history category II, Stonerock's Guidelines Range was 121 to 151 months. After considering the sentencing factors under § 3553, the district court sentenced Stonerock to 121 months' imprisonment, followed by 5 years of supervised release. This appeal ensued.

II. Defendant's Constitutional Challenges
A - Due Process and Separation of Powers

This court reviews de novo a constitutional challenge to a sentence. *United States v. Crowell*, 493 F.3d 744, 749 (6th Cir. 2007). The prosecution argues that we should review for plain error, asserting that Stonerock did not preserve his constitutional challenges. We do not agree, as Stonerock raised his constitutional challenges in a motion to stay sentencing, motion to vacate plea, and a sentencing memorandum.

Stonerock argues that his sentencing violated constitutional principles of separation of powers and due process. He maintains that the Constitution limits Congress's authority to mandate minimum sentences to three classes of cases: counterfeiting, piracies and felonies committed on the high seas, and treason. He asserts that the framers contemplated that a judge would freely fashion an offender's sentence except in these three categories of cases, and that the Sentencing Guidelines on crimes other than thes are beyond Congress's constitutional authority. Stonerock asserts that the Guidelines as a whole, or specifically as they relate to the crime for which he was sentenced, are unconstitutional.

Stonerock also maintains that Executive branch control of the ability of the judiciary to exercise its power is an unconstitutional delegation of judicial power to the Executive branch. Stonerock points to the requirement of a § 5K1.1 motion from the prosecutor as a precondition for the sentencing judge to deviate below the otherwise minimum sentencing, asserting that it gives judicial authority to a member of the Executive branch. Stonerock asserts that the Sentencing Reform Act grants unfettered discretion to the Executive to act as the only effective advocate for the rights of the accused at sentencing by granting the prosecutor unlimited authority to permit the judicial officer to deviate downward from the sentencing guidelines. We perceive no constitutional violation.

1

"Congress. . . has the power to fix the sentence for a federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional

control." *Mistretta v. United States*, 488 U.S. 361, 364 (1989) (internal citation omitted). Following *Mistretta*, this court rejected separation-of-powers challenges to mandatory minimum sentencing in *United States v. Odeneal*, 517 F.3d 406, 414 (6th Cir. 2008) (rejecting defendant's argument that statutory mandatory sentence violates the separation of powers doctrine because mandatory minimums unconstitutionally shift sentencing discretion from courts to prosecutors).[1] Further, the courts that have addressed whether the separation of powers doctrine is violated by U.S.S.G.

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[1] At argument, defense counsel asserted that *Odeneal, supra*, was distinguishable in that it involved an Eighth Amendment question, and that *Mistretta* did not address *limitation* of powers. We are not persuaded by this distinction.

Odeneal did involve an Eighth Amendment challenge. The defendant Andres argued that application of a mandatory life sentence violated the Eighth Amendment because it was grossly disproportionate to the offenses at issue, i.e., conspiracy to distribute and possess with intent to distribute 50 grams or more of cocaine base and possession of firearms in furtherance of a drug trafficking crime. 517 F.3d at 413-14. However, Andres also argued "that a statutory mandatory sentence violates the separation of powers doctrine because mandatory minimums unconstitutionally shift sentencing discretion away from the courts to prosecutors." *Id.* at 414. This court noted that it had "flatly" rejected that argument:

> We have flatly rejected this argument because "'the scope of juridical discretion with respect to a sentence is subject to congressional control.'" *United States v. Dumas*, 934 F.2d 1387, 1389 (6th Cir. 1990) (quoting *Mistretta v. United States*, 488 U.S. 361, 364, 109 S.Ct. 647, 102 L. Ed. 2d 714 (1989)). *See also id.* ("Congress can constitutionally eliminate all discretion in sentencing judges by establishing mandatory sentences . . . .")

517 F.3d at 414.

§ 5K1.1's and 18 U.S.C. § 3553(e)'s requirement of a government motion as a prerequisite to a reduced sentence based on a defendant's cooperation, have held in the negative. *See United States v. Spees*, 911 F.2d 126, 127-28 (8th Cir. 1990); *United States v. Huerta*, 878 F.2d 89, 91-93 (2d Cir. 1989), *cert. den.* 493 U.S. 1046 (1990); *United States v. Ayarza*, 874 F.2d 647, 652-53 (9th Cir. 1989), *cert. den.* 493 U.S. 1047 (1990); *see also United States v. Severich*, 676 F.Supp. 1209, 1210-11 (S.D. Fla. 1988), *aff'd*, 872 F.2d 434 (11th Cir. 1989).

In *United States v. Allen*, 873 F.2d 963, 965-66 (6th Cir. 1989), this court held that the due process clause is not violated by a court's sentencing pursuant to the Guidelines. This court and other circuit courts have also rejected claims that Congress's enactment of minimum sentences violates a defendant's due process right to an individualized sentence. *See United States v. Dumas*, 934 F.2d 1387, 1389 (6th Cir. 1990), *see also United States v. Brownlie*, 915 F.2d 527, 528 (9th Cir. 1990).

B - Ineffective Assistance of Counsel
§ 5C1.2 safety valve and conflict of interest

Stonerock asserts he was denied effective assistance of counsel because one of his attorneys, Arntz, had a clear conflict of interest created by his representation of Stephen Sammons, another alleged co-conspirator, in two separate criminal prosecutions, this case and another in Arizona. Without citing to the record, Stonerock states that Sammons inculpated Stonerock in Arizona. He further asserts that Arntz reassured him that he would receive the benefit of the sentencing safety valve under U.S.S.G. § 5C1.2, and

that he relied on Arntz's representation in his decision to accept the plea agreement. Stonerock maintains that Arntz's "conflicted and incorrect advice" led him to plead guilty and, had he known application of the safety valve was not possible, he would have insisted on pursuing the motion to suppress the firearms, and/or a trial on the merits. Stonerock maintains that Arntz's advice regarding the safety valve being available was due either to Arntz's representation of Sammons or due to Arntz's ineffective performance.

Stonerock did not raise an ineffective assistance of counsel claim below. Generally, this court will not review a claim of ineffective assistance of counsel raised for the first time on direct appeal unless the record is adequately developed. *United States v. Campbell*, 549 F.3d 364, 376-77 (6th Cir. 2008). The record as developed does not establish Stonerock's claim. Thus, his ineffective assistance claim is best addressed in a post-conviction proceeding under 28 U.S.C. § 2255. *Massaro v. United States*, 538 U.S. 500, 502-09 (2003); *United States v. Martinez*, 430 F.3d 317, 338 (6th Cir. 2005).

Conflict of Interest

On appeal, Stonerock asserts that the district court recognized that Stonerock's counsel, Arntz, had an actual conflict by simultaneously representing Stonerock and Sammons in two separate criminal prosecutions. Stonerock notes that the district court did not realize this until after Stonerock had pled guilty on Arntz's advice.

A review of the record establishes that it was co-defendant Mobley's counsel that raised the

possibility of a conflict of interest at one of the sentencing hearings, on April 1, 2004, during a discussion prompted by the district court's inquiry into the status of the Arizona case. There was discussion between the court, counsel for Mobley, and counsel for Stonerock, Arntz and Katchmer, regarding delaying sentencing in this case until the Arizona matter was resolved. Apparently the Arizona defendants were Stonerock, Sammons, and several others. Arntz and Katchmer told the district court that attorney Jon Rion was representing Stonerock in Arizona, and that Arntz was representing Sammons in Arizona.

The conflict issue never arose again. The record is thus inadequately developed to address this issue as well. *See Campbell*, 549 F.3d at 376-77.

III.

A

Stonerock next argues that the plea agreement should be specifically enforced as to the § 5K1.1 downward departure for substantial assistance. U.S.S.G. § 5K1.1 provides:

> Substantial Assistance to Authorities (Policy Statement)
>
> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

> (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
> (3) the nature and extent of the defendant's assistance;
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
> (5) the timeliness of the defendant's assistance.

The Commentary to § 5K1.1 states in pertinent part:

> 1. Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.
>
> * * *
>
> 3. Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.

Because the plea agreement in the instant case makes clear that the Goverment retains complete

discretion to determine whether to file a motion for downward departure in return for substantial assistance,[2] the Government's refusal to recommend a downward departure can only be reviewed for unconstitutional motives. *United States v. Gates*, 461 F.3d 703, 711 (6th Cir. 2006) (quoting *Wade v. United States*, 504 U.S. 181, 185-86 (1992) (holding that "federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive.")); *United States v. Hawkins*, 274 F.3d 420, 428 (6th Cir. 2001) (noting that "[w]hile some circuits have ruled that courts may conduct a bad faith review of the government's refusal to file a substantial assistance motion, this Circuit has expressly ruled that when a plea agreement allocates complete discretion to the government to consider whether a substantial

---

[2] The plea agreement provided in pertinent part:

> 4. If, in the opinion of the United States Attorney for the Southern District of Ohio, the defendant renders substantial assistance within the meaning of U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e), the United States will file a motion pursuant to these provisions. The defendant acknowledges that, under the law and the terms of this plea agreement, the United States retains sole and complete discretion in determining whether a departure motion based on substantial assistance will be filed. If such a motion is filed, the defendant understands that it is not binding on the Court, that is, the Court is not obligated to grant the motion and reduce the defendant's sentence. . . . . The defendant understands that he will not be allowed to withdraw his guilty plea if the United States does not file or the Court does not grant a substantial assistance motion. . . . .

assistance motion should be filed, we may only review the government's decision for unconstitutional motives." Internal citations omitted.) However, the plea agreement still imposed certain restraints on the Government–to analyze and determine whether substantial assistance had been rendered and, if the Government decided not to file the motion, it had to establish Stonerock's breach of the plea agreement. *See United States v. Lukse*, 286 F.3d 906, 912 & n.3 (6th Cir. 2002). The Government must exercise its discretion and determine if the defendant provided substantial assistance. *United States v. Villareal*, 491 F.3d 605, 609-11 (6th Cir. 2007), citing *Lukse* at 912.

The record in the instant case supports that the Government exercised its discretion to determine whether Stonerock had provided substantial assistance, and met its burden of showing that he had failed to do so. *Lukse*, 286 F.3d at 912 & n.3. DEA Special Agent Hathaway testified that Stonerock did not provide certain requested financial information and did not answer questions regarding local co-conspirators.

Stonerock's related argument that the downward departure should be enforced because the district court told him that the Government was duty bound to file the § 5K1.1 motion, is unavailing. The district court merely reiterated to Stonerock what the plea agreement stated–that if the Government, in its discretion, concluded that Stonerock had rendered substantial assistance, it would move for a § 5K1.1 downward departure.

Stonerock's argument that the plea agreement should be specifically enforced fails.

B

Stonerock also asserts that theletter and spirit of the plea agreement required that the alleged use or possession of a firearm would not be considered in sentencing. He notes that the Government agreed to dismiss the firearm count of the indictment, and that all mention of the firearms was removed from the statement of facts. Stonerock contends that by agreeing to the plea agreement, he lost his right to challenge and suppress the firearms, and maintains that the Government "breached its duty of good faith or is equitably estopped from adducing information about the alleged firearm possession when 1) the Government lead [sic] Mr. Stonerock to reasonably rely on the dismissal and removal from the statement of facts as an indication that the firearms were no longer at issue and 2) the Plea Bargain simultaneously prevented Mr. Stonerock from pursuing his meritorious motion to suppress the firearms."

At argument, the question arose whether the district court was cognizant that the plea agreement stated, "The defendant understands that the government will recommend to the Court that the base offense level for purposes of the federal sentencing guidelines for Count I is level 32, based upon the amount of controlled substances reasonably foreseeable to the defendant *and all relevant conduct*." (Emphasis added). Defense counsel argued that contrary to this plea language, the Government put in proofs regarding firearms.

Stonerock also contends that the district court violated *United States v. Booker*, 543 U.S. 220 (2005), by applying the firearm enhancement.

Although the PSR recommended the firearm enhancement be applied, the district court agreed (on Stonerock's request) to hear testimony related to the firearm enhancement. DEA Agent Hathaway testified that he was present when the search warrant was executed at Stonerock's residence and two firearms were found. Hathaway also testified that at least one of the firearms was loaded and under the sofa in the family room. The other was in the master bedroom closet.

The court's decision overruling the motion to vacate plea rejected Stonerock's arguments that 1) when he entered the plea he did not agree that he possessed a firearm in connection with the drug conspiracy and that, therefore, enhancing his offense level under the advisory guidelines and denying him the protection of the safety valve, 18 U.S.C. § 3553(f), would violate *Booker*; and 2) that *Booker* created a new sentencing system, which justified the withdrawal of his guilty plea. The court also rejected Stonerock's argument that his decision to enter a guilty plea was based on the assumption that he would qualify for the safety valve and that, therefore, he would not be required to serve the mandatory minimum sentence of ten years.

> In Booker, the Supreme Court reaffirmed that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." 543 U.S. at 244. Herein, Stonerock admitted during the change of plea hearing that the amount of marijuana that was attributable to him exceeded 1,000

kilograms. See Doc. #91 at 5. Therefore, by that admission and the entry of the guilty plea, in accordance with 21 U.S.C. § 841(b)(1)(1)(A), he exposed himself to a statutory maximum sentence of life imprisonment. If the safety valve were applicable, this Court could impose a sentence below the mandatory minimum sentence of ten years; however, its inapplicability will not permit this Court to sentence Stonerock to more than life imprisonment. Accordingly, the Court rejects the argument that denial of the safety valve will violate Booker, since he did not admit to possession of a firearm.

The Court also rejects his second argument, given that federal courts have routinely held that the Supreme Court's decision in Booker, after a guilty plea, does not provide a defendant the basis for withdrawing that plea. See e.g., United States v. Roque, 421 F.3d 118 (2d Cir. 2005); United States v. Green, 405 F.3d 1180 (10th Cir. 2005); United States v. Sahlin, 399 F.3d 27, 30 (1st Cir. 2005). In accordance with those decisions, this Court concludes that the fact that the Supreme Court decided Booker after Stonerock had entered his guilty plea does not warrant the withdrawal of such.

In addition, the Court rejects the premise that Stonerock should be permitted to withdraw his guilty plea, because he entered it under the assumption that he would qualify for the safety valve. Doc #91 at 7. In response, the Government's counsel stated that it had information which would render him ineligible

for the safety valve (i.e., a firearm was involved and his level of participation in the charged conspiracy). Id. at 7-8. This Court explained to Stonerock that he faced a mandatory minimum sentence of ten years, unless he qualified for the safety valve or provided substantial assistance. Id. at 9. During the evidentiary hearing, the two attorneys who had represented him during the change of plea hearing testified that they had not promised him that he would qualify for the safety valve, although they believed that good arguments in support of that proposition existed. Stonerock's testimony on that point was internally inconsistent. Although he indicated that his counsel had not made such a promise, he did testify that they had told him that he would qualify for the safety valve. Given Stonerock's inability to explain that inconsistency or to offer a credible reason for not questioning the statement of Government's counsel during the change of plea hearing that he would not so qualify, this Court is unable to credit Stonerock's testimony in that regard. Therefore, the Court finds, as a matter of fact, that, although Stonerock knew there were credible reasons to believe that he would qualify for the safety valve, the Government opposed same and the issue had not been resolved when he entered his guilty plea. Therefore, he knew that he subjected himself to a mandatory minimum sentence of ten years by entering the guilty plea and did not enter that plea under the assumption that he would so qualify for the safety valve. [J.A. vol. III, 297-99/Decision & Entry Overruling Def.'s Motion to Vacate Plea, 6/18/07.]

We agree with the district court that there was no *Booker* violation.

We cannot, however, conclude that the district court properly applied U.S.S.G. § 2D1 because it is unclear whether the plea agreement permitted such an enhancement.

U.S.S.G. § 2D1 provides in pertinent part:

> Unlawful Manufacturing. . . . Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy
>
> (b) Specific Offense Characteristics
>
> (1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

The Commentary, Application Note 3 states in pertinent part:

> The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet. . . .

As the Government points out, under the Commentary to U.S.S.G. § 2D1.1, the two-level firearm enhancement "should be applied if the weapon was present, unless it is clearly improbable that the

weapon was connected with the offense." On its face, U.S.S.G. § 2D1 seems to apply. However, as part of the plea agreement the Government agreed to recommend a base offense level of 32, that would include all relevant conduct. Stonerock asserts that the relevant conduct included any weapons possession, so that a two-point enhancement was not appropriate. Because the district court did not address the agreement in this context, we remand for a determination whether the two-point enhancement was consistent with the agreement.

IV.

Stonerock's final argument is that the sentence imposed is outside the statutory limits, i.e., that his sentencing range was erroneously determined because the Government failed to request a three-point adjustment for his acceptance of responsibility or because of an inadvertent error by the court. He asserts that "[t]he additional sentencing points that were added and/or not subtracted, as required by the Plea Agreement and for Mr. Stonerock's cooperation, resulted in a sentence outside the statutory limits for the crimes to which Mr. Stonerock agreed to plead."

Because Stonerock did not raise this issue at sentencing, this court's review is for plain error. *United States v. Leachman*, 309 F.3d 377, 380 (6th Cir. 2002), citing Fed. R. Crim. P. 52(b). "There is plain error only if there is an error that is plain, and it also affects the substantial rights of the defendant. Even so, we will act on the error only if it seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *Id.*

U.S.S.G. § 3E1.1 provides in pertinent part:

Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct **by timely notifying authorities of his intention to enter a plea of guilty**. . . decrease the offense level by 1 additional level. [Some emphasis added.]

Stonerock is correct that the plea agreement stated that "the Government will recommend that the Defendant be given a 3 point adjustment for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1," and the Government concedes that "[u]ndoubtedly, the plea agreement could have clarified that the total three-level reduction contemplated by the parties encompassed both a two-level reduction for acceptance of responsibility and an additional one level for timely notification of intent to plead guilty." Nonetheless, Stonerock received a three-point adjustment under § 3E1.1, i.e., two points for acceptance of responsibility and one point for timely notification of intent to plead guilty. U.S.S.G. § 3E.1.1 permits only a total reduction of three points.

The court awarded Stonerock the full three-point reduction, and this 3-point adjustment reduced Stonerock's offense level to 31. We conclude that Stonerock has not established plain error.

Affirmed in part, remanded in part for a determination whether the two-point enhancement under U.S.S.G. § 2D1 is contrary to the plea agreement.

MERRITT, Circuit Judge, concurring. I concur in Judge White's opinion, but I would hope on remand that the government will reassess its decision — not subject to judicial review — to invoke the 10-year mandatory minimum in this non-violent marijuana case. The punishment seems unduly harsh. If given the benefit of Offense Level 32 minus 3 Levels, as promised in the plea agreement, the sentence would be more reasonable. Apparently, this cannot be done without a § 5K1.1 motion. The Department of Justice should give some consideration to the possibility of rehabilitation in this case, as well as to the enormous expense to the taxpayer imposed by mandatory minimum sentences in non-violent marijuana cases, a drug that some states have now legalized. The present law effectively makes the prosecutor the sentencer in these cases, and so the prosecutor should not view the case simply as an adversary but take the broader view using the great power of the Department of Justice to see that justice is done. It should take the opportunity to use the tools at hand — here, a 5K1.1 motion — to see that unreviewable, excessive, un-individualized mandatory minimum sentences are not imposed.

APPENDIX B

UNITED STATES DISTRICT COURT
Southern District of Ohio at Dayton

Case Number: CR 3-02-005(01)
USM Number: 43368-061

[Filed May 25, 2007]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
ROBERT A. STONEROCK	)
	)

JUDGMENT IN A CRIMINAL CASE

JON PAUL RION, ESQ.
Defendant's Attorney

THE DEFENDANT:

[✔] Pleaded guilty to count: One (1) of the Indictment.

* * *

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 USC § 846	CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE AND TO DISTRIBUTE IN EXCESS OF 1,000 KILOGRAMS OF MARIJUANA	November 27, 2001	One (1)

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) __.

[✔] Count(s) Two (2) of the Indictment is dismissed on the motion of the United States.

IT IS ORDERED that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in the defendant's economic circumstances.

May 15, 2007
Date of Imposition of Judgment

/s/Walter Herbert Rice
Signature of Judicial Officer

WALTER HERBERT RICE, U.S. District Judge
Name and Title of Judicial Officer

5-25-07
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: one hundred and twenty-one (121) months.

[✓] The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the defendant be accorded all allowable presentence credit for time spent incarcerated.

The Court recommends that the defendant be incarcerated as close to his home in the Dayton, Ohio, area as possible consistent with his security status.

The Court recommends that the defendant be made eligible for and enrolled in the 500 hour residential drug treatment program.

* * *

[✔] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2:00 p.m. on
[✔] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: five (5) years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court.

* * *

[✓] The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

[✓] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

* * *

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

Defendant shall provide complete and unfettered access to his business and personal financial records at all times, at the request of the probation officer.

The defendant shall seek and maintain employment throughout the period of supervision.

The defendant shall serve a period of 100 hours of community service with an agency and on a schedule agreed upon by the defendant and the probation officer over the first two years of supervision.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

	Assessment	Fine	Restitution
Totals:	$ 100.00	$15,000.00	$

* * *

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[✔] the interest requirement is waived for the [✔] fine [ ] restitution.

* * *

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A [✔] Lump sum payment of $ 100.00 as to special assessment due immediately, balance due

[ ] not later than , or

[✔] in accordance with [ ] C, [ ] D, [ ] E, or [✔] F below; or

* * *

F [✓] Special instructions regarding the payment of criminal monetary penalties:

[✓] If the defendant, while incarcerated, is working in a non-UNICOR or grade 5 UNICOR job, the defendant shall pay $25.00 per quarter toward defendant's monetary obligation. If working in a grade 1-4 UNICOR job, defendant shall pay 50% of defendant's monthly pay toward defendant's monetary obligation. Any change in this schedule shall be made only by order of this Court.

[✓] After the defendant is released from imprisonment, and within 60 days of the commencement of the term of supervised release, the probation officer shall recommend a revised payment schedule to the Court to satisfy any unpaid balance of the monetary penalty. The Court will enter an order establishing a schedule of payments.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

* * *

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

* * *

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-3739

[Filed April 2, 2010]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
ROBERT A. STONEROCK,	)
	)
Defendant-Appellant.	)
	)

O R D E R

BEFORE: MERRITT, COOK, and WHITE, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green, Clerk

Leonard Green, Clerk